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No. 80-1735

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

FEDERAL BUREAU OF INVESTIGATION AND THE UNITED STATES DEPARTMENT OF JUSTICE,
Petitioners

v.

HOWARD S. ABRAMSON,
Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

This action arose when Howard S. Abramson, the Respondent, as a professional journalist, attempted to use the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to acquire information concerning the extent to which the White House may have used the Federal Bureau of Investigation (FBI) and its files to obtain derogatory information about political opponents and those that it perceived as enemies (Pet. App. at 4a).

On June 23, 1976, Abramson filed a request pursuant to the FOIA seeking the following documents from the FBI (J.A. 7-8):

— Copies of any and all information contained in the FBI's files showing or indicating the transmittal of any documents or information from the FBI to the White House, or any White House aides, for the years 1969 and 1970, concerning the following individuals: Lowell P. Weicker, Jr.; Thomas J. Meskill; Joseph Duffey; Thomas J. Dodd; Alphonsus J. Donohue; John Lupton; Wallace C. Barnes; and Emilio Q. Daddario;

— Copies of any and all information so transmitted;

— An uncensored copy of the Oct. 6, 1969, letter from J. Edgar Hoover to John D. Ehrlichman by which Mr. Hoover transmitted "memoranda" on several individuals to Mr. Ehrlichman;

— A copy of the original request letter from Mr. Ehrlichman to Mr. Hoover for that data;

— Copies of all data so transmitted by the Oct. 6, 1969, letter from Mr. Hoover to Mr. Ehrlichman; and

— A copy of the receipt signed by the recipient at the White House of the Oct. 6, 1969, letter.

Clarence M. Kelley, then the director of the FBI, notified Abramson by letter dated July 23, 1976, that the Bureau refused to search its files for any such information until Abramson obtained notarized authorization for the disclosure of the information from the subjects of the request (Pet. App. 5a). Otherwise, Kelley asserted, the information was exempt from disclosure pursuant to Exemp-

tions 6 and 7(C) of the FOIA, 5 U.S.C. § 552(b)(6)[1] and (b)(7)(C), both of which deal with exemptions to disclosures, under certain specified conditions, that would also involve unwarranted invasions of personal privacy.[2]

On receiving Kelley's response, Abramson assumed his initial request was too specific and that in its specificity it violated the privacy of others (Pet. App. 5a-6a). He therefore filed a new and broader request on August 3, 1976, which did not include the names of specific individuals (Pet. App. 6a). On August 20, 1976, Kelley denied Abramson's second request saying he failed to reasonably describe the records sought (Pet. App. 6a).

After exhausting his administrative appeals, on December 20, 1977, Abramson filed suit in the United States District Court for the District of Columbia to enjoin the FBI and the Department of Justice from withholding the requested records and to make them immediately available to him (Pet. App. 7a). The Petitioners' answer denied all liability under the FOIA, consistent with their position throughout the administrative appeals (*id.*).

However, after filing an answer, Petitioners reprocessed Abramson's request and provided him with four groups of records, a total of 84 pages of material, some with deletions (Pet. App. 7a, 9a-10a, n.12.). Petitioners asserted that that deletions were made pursuant to Exemptions 1,

[1]Exemption 6 authorizes withholding documents from disclosure that are "personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The government no longer asserts Exemption 6 as a justification for nondisclosure (Pet. App. 5a, n. 8).

[2]Exemption 7(C) authorizes withholding of documents that are "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . .(C) constitute an unwarranted invasion of personal privacy . . . ."

7(C) and (D) (*id*)[3]. The four groups of records each consist of a cover letter dated October 6, 1969, from FBI Director J. Edgar Hoover to John D. Ehrlichman, an aide to then-President Richard M. Nixon, with enclosures (*i.e.*, name check summaries and, in some cases, attachments) regarding FBI name checks on the individuals listed in the cover letters (Pet. App. 9a-10a, n.12).

The information at issue here consists of deletions from one of those four groups of records, referred to as Document 3, which is composed of (i) the cover letter dated October 6, 1969, listing the names of 11 individuals about whom "name check" requests had been made (J.A. 29); (ii) name check summaries of FBI files containing information on 10 of the 11 individuals; and (iii) an article written by John Kenneth Galbraith, an advertisement in the *New York Times* of September 28, 1969, prepared by the Vietnam Moratorium Committee and endorsed by the 11 individuals and four senators (J.A. 33-6), and a typed list of the individuals whose names appeared in the advertisement (Pet. App. 8a, n. 12).

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[3]Exemption 1, 5 U.S.C. §552(b)(1), authorizes withholding of documents that are "(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order."

Exemption 7(D), 5 U.S.C. § 552(b)(7)(D), authorizes withholding of documents that are "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . .(D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source. . ."

The material expurgated pursuant to Exemptions 1 and 7(D) is no longer at issue (Pet. App. 3a, n. 5).

On January 3, 1979, the District Court issued an order denying Petitioners' motion to dismiss or, in the alternative, for summary judgment, holding (Pet. App. 32a-34a), *inter alia*, with respect to Exemption 7(C) and (D), ". . . that the agency had failed to show that the information was compiled for law enforcement, rather than political, purposes" (Pet. App. 26a-27a).

In September, 1979, Petitioners filed their renewed motion for summary judgment, additional affidavits by two FBI employees describing the four documents that were processed in response to Abramson's request, and an explanation in each instance of the justification for nondisclosure (J.A. 5, and Pet. App. 9a). On September 25, 1979, Abramson filed a modified request, seeking only the material withheld from Document 3 by the Petitioners under Exemption 7(C) (Pet. App. 10a and J.A. 37-41).

The District Court again found that the FBI had failed to show that the information was compiled for law enforcement, rather than political, purposes, ruling on November 30, 1979, that:

> . . . Thus, there has been absolutely no showing that these particular records were compiled for law enforcement purposes. Accordingly, the defendants [the Government] have failed to meet their burden and summary judgment will be granted in favor of the plaintiff [Abramson] on this point (Pet. App. 27a).

However, the District Court did not order the documents released, ruling that Exemption 7(C) was validly invoked by the Government ". . . because disclosure would constitute an unwarranted invasion of personal privacy" (Pet. App. 27a).

Respondent Abramson appealed the District Court's ruling on Exemption 7(C) claims (Pet. App. 11a & n. 14) and the Court of Appeals reversed (*id.* at 1a-22a).

Before the Court of Appeals, Petitioners "acknowledged that the 'name check' summaries were not compiled for law enforcement purposes," (Pet. App. 14a) but argued that the information contained in such documents was nevertheless withholdable under Exemption 7(C) because it had originally been compiled by the FBI for law enforcement purposes (*id*).

However, the Court of Appeals found, "Even if we accept the truth of the Government's assertion, we are still left with undisputed facts indicating that . . . the documents constituting the 'name check' summaries were not compiled for any legitimate law enforcement purposes" (Pet. App. 14a-15a).

Furthermore, the Court of Appeals held, ". . . the statutory scheme of the FOIA very clearly indicates that exemptions from disclosure apply only to *documents,* and not to the use of the information contained in such documents. Thus, when information has been recompiled in a new document for a new purpose, the new document must qualify independently for any exemptions from disclosure under the FOIA" (Pet. App. 15a) (original emphasis).

Since Petitioners have conceded that the ". . . White House 'name check' requests resulted in the production of documents which are distinct from the underlying documents already contained in the FBI files. . ." (Pet. App. 15a-16a) and have acknowledged that the "name check" summaries were not compiled for law enforcement purposes (Pet. App. 14a), the Court of Appeals found ". . . that the recompiled summary documents have been

improperly withheld" (Pet. App. 18a). The Court of Appeals reversed the District Court and instructed it to require Petitioners to release all of the "name check" summaries heretofore withheld pursuant to Exemption 7(C) (Pet. App. 22a).[4]

Petitioners' petition for rehearing, with suggestion for rehearing en banc, was denied by nine judges, with two other judges dissenting (Pet. App. 24a-25a).

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[4]The Court of Appeals did not rule on whether the "attachments" to Document 3 could be withheld under Exemption 7(C). Instead it remanded this issue to the District Court, with the following instructions:

> ". . . We remand to the District Court for a finding on the issue of whether the attachments that were sent to the White House in response to its requests for 'name checks' were the *original documents* from the FBI files compiled prior to the White House requests, and whether they were originally compiled pursuant to a legitimate law enforcement investigation [emphasis in original]. Should the District Court on remand find that the 'attachment' documents are in fact investigatory records which were compiled for law enforcement purposes, *then* a determination must be made as to whether the attachments are exempt from disclosure under Section (b)(7)(C)" (Pet. App. 21a-22a) (emphasis added).

The issue of the "attachments" to the name check summaries came up for the first time during oral argument before the Court of Appeals. That court made the distinction in its opinion without first examining the nature of the records released to Abramson with certain lines deleted. It is the availability of those deleted words and lines under exemption 7(C) which is now before this Court. Petitioners and Abramson apparently dispute how the word "attachments" was used by the Court of Appeals. Abramson believes that the Court of Appeals divided the documents into two categories: (1) all the name check summaries prepared in response to *any* White House request included in Document 3, and (2) unspecified "attachments" to these summaries (see P. 4, *supra*, for description of document). Petitioners apparently contend that deleted portions of such name check summaries prepared *prior* to the 1969 White House request and included in Document 3 are the "attachments" referred to by the Court of Appeals (Pet. Br. at 29).

SUMMARY OF ARGUMENTS

The Court of Appeals correctly held that the documents in question had been compiled for non-law enforcement purposes and were thus not exempt from disclosure pursuant to Exemption 7(C).

1. The plain meaning of Exemption 7, which protects "investigatory records compiled for law enforcement purposes," leaves no room for doubt that the threshold factor in determining the applicability of the exemption is the purpose for which the document was prepared and not the origin of the information contained therein. Since the lower courts have found that the documents in question were compiled for partisan political reasons, and not for law enforcement reasons, the government has failed to meet the threshold requirement of Exemption 7. Therefore, the requested records cannot be withheld under Exemption 7(C).

2. Abramson's interpretation of the plain meaning of Exemption 7(C) is supported by the underlying legislative history and Congress' intent that the FOIA's exemptions be narrowly construed. Petitioners are attempting to interpret the legislative history to persuade this Court to create a new privacy exemption, even though Congress has directed the courts to read the Act in a manner which encourages disclosure and discourages expansion of the existing exemptions or creation of new ones.

ARGUMENT

THE COURT OF APPEALS CORRECTLY RULED THAT AGENCY RECORDS ARE EXEMPT FROM DISCLOSURE UNDER EXEMPTION 7(C) ONLY IF THEY MEET THE THRESHOLD REQUIREMENT OF BEING "INVESTIGATORY RECORDS COMPILED FOR LAW ENFORCEMENT PURPOSES," NOTWITHSTANDING THE ORIGIN OF THE UNDERLYING INFORMATION IN SUCH RECORDS.

The Court of Appeals correctly held that records may be withheld under Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(C), only if they meet the threshold requirement of being "investigatory records compiled for law enforcement purposes." Since the District Court found – and Petitioners have conceded – that the requested records do not meet this requirement, Petitioners cannot avail themselves of Exemption 7's clause (C), which allows an agency to withhold the records in issue, "but only to the extent that production of such records would. . . (C) constitute an unwarranted invasion of personal privacy."

Petitioners claim, in effect, that notwithstanding the failure of the requested records to meet Exemption 7(C)'s standards for non-disclosure, the records are nonetheless exempt because the information contained therein was originally compiled for law enforcement purposes and that this exempt status passes through and remains intact in any recompilation of the information, regardless of the purposes for such recompilation.

That interpretation is nowhere supported by the literal language of the FOIA and the underlying Congressional intent. Petitioners are, in effect, claiming an exemption for "pass through" material. This argument is belied, however, by the literal language of the statute, the intent

of Congress that the FOIA serve as a disclosure statute and Congressional insistence that requested "records" – not "information" – be exempt only to the extent they fall within one of the nine specified exemptions, which are to be narrowly construed. If the Petitioners' contention is upheld, they would be receiving a far broader exemption than Congress ever intended.

A. The Plain Meaning Of Exemption 7 Requires A Threshold Inquiry Into The Purpose For Which The Requested Records Were Compiled And Not The Purpose For Which The Underlying Information Was Originally Compiled.

The Freedom of Information Act was enacted "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965); *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 351 (1979); *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975); *EPA v. Mink*, 410 U.S. 73, 80 (1973). To make it "clear beyond doubt that all materials of the government are to be made available to the public . . . unless specifically allowed to be kept secret by one of the exemptions. . ." and that the exemptions are exclusive, Congress provided that nothing in the Act should be read to "authorize withholding of information or limit the availability of records to the public, *except as specifically stated* . . ." 5 U.S.C. § 552(c) (emphasis added); S. Rep. No. 813, *supra* at 10; *EPA v. Mink, supra*, 410 U.S. at 79; *Department of Air Force v. Rose, supra*, 425 U.S. at 361; *Jordan v. Department of Justice*, 591 F.2d 753, 761 (D.C. Cir. 1978) (*en banc*).

The government bears the burden of proving that an exemption applies, 5 U.S.C. § 552(a)(4)(b), and the exemptions are to be narrowly construed. *Department of Air Force v. Rose, supra,* 425 U.S. at 361; *Vaughn v. Rosen (I),* 484 F.2d 820, 823 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 977 (1974). Moreover, because the Act's primary objective is the fullest possible disclosure of agency records, any doubts about the proper interpretation of an exemption are to be resolved in favor of disclosure. *Department of Air Force v. Rose, supra,* 425 U.S. at 365, *citing with approval, Vaughn v. Rosen (II),* 523 F.2d 1136, 1141 (D.C. Cir. 1975).

It is in this context that the Court should approach the issue raised before it in this case. The FOIA exemption at issue, Exemption 7(C), protects from disclosure "matters that are . . . investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would. . .(C) constitute an unwarranted invasion of personal privacy."

The Court of Appeals correctly gave effect to the plain meaning of this language and ruled that records may be witheld under clause (C) only if they first fall within the definition of "investigatory records compiled for law enforcement purposes." The courts have consistently held that the "threshold question" or "critical factor" to Exemption 7 is the purpose for which the document was prepared, and not the information contained therein. *Lesar v. U.S. Dept. of Justice,* 636 F.2d 474 (D.C. Cir. 1980); *Pope v. United States,* 599 F.2d 1383 (5th Cir. 1979); *Rural Housing Alliance v. U.S.D.A.* 498 F.2d 80, 82 (D.C. Cir. 1974) (held with respect to Exemption 7 that "The purpose of the 'investigative files' is thus the critical factor.")

In fact, the Justice Department itself encouraged agencies to follow this analysis in a memorandum explaining how to implement the 1974 FOIA amendments.[5]

In the instant case, the District Court gave Petitioners two opportunities to prove that the requested records were exempt from disclosure. Despite the submission of two lengthy affidavits, the District Court ruled that: ". . . there has been absolutely no showing that these particular records were compiled for law enforcement purposes. Accordingly, the defendants [Petitioners] have failed to meet their burden, and summary judgment will be granted in favor of the plaintiff on this point" (Pet. App. 11a).

In addition, even ". . . the Government [Petitioners] acknowledged that the 'name check' summaries were not compiled for law enforcement purposes . . ." (Pet. App. 14a).

Giving effect to the plain meaning of Exemption 7, then, warrants upholding the Court of Appeals' decision that the requested records are not exempt under Exemption 7(C).

Petitioners, however, maintain that the origin of the information contained in the document is the threshold issue.

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[5]Even the Justice Department has acknowledged, when it attempted to clarify the FOIA for the entire government, that the threshold question to Exemption 7 is the *purpose* for which the document was compiled, and not the information contained therein. (*Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act*, U.S. Department of Justice, February 1975, p. 6).

"Once it is determined that a request pertains to 'investigatory records compiled for law enforcement purposes,' *the next* question is whether release of the material would involve one of the six types of harm specified in clauses (A) through (F) of amended Exemption 7." (Id. at 6-7, emphasis added.)

The courts, on the other hand, have held that when the cited FOIA exemption relates to a specific type of document, it must refer to the document in question, and does not pass through from the underlying documents which may be incorporated, in whole or in part, into the document. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975) (held that documents that are arguably exempt from disclosure under Exemption 5 of the FOIA lose their exemption when they are incorporated into non-exempt documents; and that the original document which was incorporated by reference in a non-exempt document could still be exempt under the Act, but that the recompiled document was disclosable); *Niemeier v. Watergate Special Prosecution Force,* 565 F.2d 967 (7th Cir. 1977) (Memoranda lost its exempt status when quoted and expressly adopted by reference by Watergate Special Prosecution Force); *Simpson v. Vance,* 648 F.2d 10 (D.C. Cir. 1980) (held that the State Department Biographic Register was not exempt, even though information in the Register was extracted from personnel files which may have been exempt under Exemption 6).

The Court of Appeals in this case noted that an argument similar to the one raised by the Petitioners, concerning whether the asserted status of the underlying documents would affect the threshold requirement of Exemption 7, had been recently considered and rejected by the court in *Lesar v. U.S. Dept. of Justice,* 636 F.2d 472 (D.C. Cir. 1980) (Pet. App. 16a). In *Lesar,* the requester sought the disclosure of deletions from reports released to him that had been prepared by the Civil Rights Division and a special task force in the Department of Justice concerning FBI surveillance of Dr. Martin Luther King. The Justice Department had excised these materials, claiming as authority Exemption 7(C).

The *Lesar* court found that the original investigation of Dr. King by the FBI had at some point "strayed beyond its initial lawful scope and took on the nature of a campaign to harass and attempt to discredit Dr. King." (*Id.* at 487).[6] But that court, after noting there was no dispute about the recompilation of the information from the files being for a law enforcement purpose, determined the document in question met the threshold requirement of Exemption 7. That court rejected Lesar's "pass through" argument that it look to the purpose for the *original* compilation of the information, and "pass through" that purpose to any recompilation, regardless of the reason for the creation of the recompiled document (*id.*).

In the converse situation presented here, the Court of Appeals correctly found that, pursuant to the clear statutory language of Exemption 7(C), the threshold test is the purpose for which the requested document was compiled, and not the origin of the information contained within the document (Pet. App. 15a). Since the threshold requirement was not met, Exemption 7 cannot be used to bar disclosure.

B. The Court Of Appeals' Interpretation Of Exemption 7(C) Is Supported By The Legislative History And Congressional Intent In Enacting The FOIA.

It is a well established principle of statutory construction that where the plain meaning of a statute is apparent on its face, a court need not look beyond the language of

[6]Writing for the court, Judge Wilkey observed that if the documents in dispute were the actual records relating to FBI surveillance of Dr. King, "we would have serious doubts whether they could be construed in their entirety as 'investigatory records compiled for law enforcement purposes'," *id.* at 486.

the statute to its legislative history. *Caminetti v. United States,* 242 U.S. 470, 485 (1917); *Markham v. Colonial Mortgage Service Co. Associates Inc.,* 605 F.2d 566, 569 (D.C. Cir. 1979); *United States v. Rone,* 598 F 2d. 564, 569 (9th Cir.); *cert. denied sub nom. Little v. United States,* 445 U.S. 946 (1979); *see also* Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum,. L. Rev. 527, 533 (1947). Moreover, the proper function of legislative history is to *resolve,* not create, ambiguities. *United States v. Missouri Pac. R. Co.,* 278 U.S. 41, 48 (1928); *Jordan v. Department of Justice supra,* 591 F.2d at 768; *FTC v. Manager, Retail Credit Co.,* 515 F.2d 988, 995 (D.C. Cir. 1975).

As explained in the prior section, the plain language of Exemption 7 requires the Government to first meet the burden of proving that the document was compiled for law enforcement purposes.

Nevertheless, Petitioners, having failed to meet the threshold requirement (*i.e.,* burden of proof) of the language of their claimed exemption (Pet. App. 10a and 18a), are now citing the legislative history behind Exemption 7 and arguing, in effect, that the Court should create a new privacy exemption (Pet. Br. 15-30).

This argument cannot succeed, however, for the legislative history supports Abramson's position, and both Congress and this Court have made it clear that agency records are exempt only to the extent they fall within one of the FOIA's nine exemptions. *Department of Air Force v. Rose, supra; EPA v. Mink, supra.* The FOIA does not permit the courts to balance the policy considerations involved in disclosure or nondisclosure of a particular document. *Jordan v. Department of Justice, supra,* 591 F.2d at 781. Congress has already done this by establishing

specific categories of exempt information, and it remains the exclusive prerogative of Congress to fashion an exemption where needed to protect a legitimate governmental interest. *Id; cf., Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 558 (1978); *T.V.A. v. Hill,* 437 U.S. 153, 195 (1978). For the courts to assume this legislative function would alter the balance Congress struck, and thereby improperly intrude on the legislative function. Indeed, in those instances in the past where the courts have expanded upon the scope of one of the exemptions, Congress did not hesitate to act quickly to amend the Act in order to reinstate the specific legislative purpose.[7]

The 1974 amendment to Exemption 7 was specifically enacted because the courts were interpreting Exemption 7 "woodenly and mechanically"[8] as barring disclosure of *any* record contained in an "investigatory file," regardless of whether the document was investigatory in nature or

[7]In 1974, in response to the Supreme Court's decision in *EPA v. Mink,* 410 U.S. 73 (1973), Congress amended the FOIA to make it clear that courts were authorized to conduct *in camera* review of the government's national security claims under Exemption 1 and to determine *de novo* whether information was "properly classified" within the meaning of the exemption. *See* House Comm. on Government Operations & Senate Comm. on the Judiciary, 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 (P.L. 93-502); Source Book; Legislative History, Texts, and Other Documents 333 (Jt. Comm. Print 1975) (hereinafter "1975 Source Book"). At the same time, Congress also amended Exemption 7 in direct response to a series of decisions of the District of Columbia Circuit which had interpreted the exemption broadly. *Id.* at 335-6. In 1976, Congress amended the Act to overcome an overly expansive interpretation of Exemption 3 by the Supreme Court in *Administrator, FAA v. Robertson,* 422 U.S. 255 (1975). H.R. Rep. 880, Part I, 94th Cong., 2d Sess. 23 (1976).

[8]1975 Source Book at 335. As Senator Hart stated in introducing his amendment, "Our amendment is broadly written, and when any one of the reasons for non-disclosure is met, the material will be unavailable. But the material cannot be, and ought not to be, exempt

(Cont.)

not. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 230 (1978). As a result, the amendment to Exemption 7 proposed by Senator Hart and ultimately adopted narrowed the scope of the Exemption from "investigatory files" to "investigatory records" (1975 Source Book 332).

In introducing his amendment to Exemption 7 on the floor of the Senate, Senator Hart stated: "Recently, the courts have interpreted the seventh exception to the FOIA to be applied whenever an agency can show that the document sought is an investigatory file compiled for law enforcement purposes – a stone wall at that point. The court would have the exemption applied without the need of the agency to show why the disclosure of the particular document should not be made." (120 Cong. Rec. 17033, reprinted in 1975 Source Book p. 332.[9])

After Senator Hart introduced the amendment to Exemption 7, there was extensive Senate debate on it. It is clear from that debate that non-law enforcement records of the FBI are not to be withheld under Exemption 7 (1975 Source Book at 346-348).

In addition, the Senate, during the debate which led to the successful override of the President's veto of the 1974 amendments, specifically noted its approval of the District

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merely because it can be categorized as an investigatory file compiled for law enforcement purposes." *Id.* at 333. Later in the debate, Senator Kennedy added that the amendment was designed to overrule some recent D.C. Circuit opinions which were contrary to "the interpretation in the Senate's development of that [1966 FOIA] legislation that the 'investigatory file' would be extremely narrowly defined." *Id.* at 349.

[9]Since the amendment (which was adopted) was introduced on the floor, it was not included in the original House or Senate bills amending the FOIA. Thus, the legislative history is found primarily in the debates on the amendment, and in the later debates concerning the decision to override President Ford's veto.

Court's holding that *FBI files* compiled for purposes other than law enforcement were not exempt pursuant to Exemption 7, referring to *Stern v. Richardson,* 367 F. Supp. 1316 (D.D.C. 1973) (1975 Source Book pp. 440-441). Not only was specific reference made to the *Stern* case, but it was also stated on the Senate floor by the floor manager of the 1974 amendments that Exemption 7 was specifically designed to disclose such abusive practices of the FBI.

> "In the case where NBC newsman Carl Stern took the FBI to court to obtain documents relating to counterintelligence programs, the Bureau took the position that those documents were 'investigatory files.' The FBI argued this point strongly, but a Federal judge even more forcefully found it lacking in substance. . . No doubt this is just the kind of document – revealing a program that earlier this week the Justice Department itself characterized as involving 'practices that can only be considered abhorrent in a free society' – that the FBI would find impractical to review and unlikely to be available for release. Yet this is also precisely the kind of Government activity which the public has the greatest interest in knowing about. . . As these cases illustrate, *not even the FBI should be placed beyond the law, the freedom of information law.* Watergate has shown us that unreviewability and unaccountability in government agencies breeds irresponsibility of government officials." (1975 Source Book p. 440) (emphasis added).[10]

[10]*See, e.g.,* remarks of Senator Weicker (1975 Source Book at 346-348). Abramson believes that the White House use of the FBI to obtain confidential information – disclosing not only personal information but also names of informants for partisan political reasons – is just the kind of "abhorrent practice" Congress refused to exempt (Cont.)

At the same time Congress recognized that all of the government's files would be released if they were not compiled for law enforcement purposes (or exempted under another provision of the FOIA), it was also aware that personal information concerning individuals was contained in such files. However, the statutory structure of the amendments clearly shows that Congress determined to prevent disclosure of personal information under Exemption 7 only from files which had been compiled for law enforcement purposes.

And even the limited protection Congress granted under Exemption 7 was not absolute. Under clause (C), the individual's interest in privacy is required to be balanced by the court against the public's right to an open government. *See e.g. Lesar, supra.; Common Cause v. Nat'l. Archives and Records Service,* 628 F.2d 179 (D.C. Cir. 1980). In the case of records compiled for non-law enforcement purposes, the balance under exemption 7(C) is automatically tipped in favor of disclosure.

(Cont.)
from disclosure. Further, Abramson believes that some of the practices that Petitioners claim they will be forced to cease if the Court of Appeals is upheld, also typify just that kind of activity.

While some of the practices listed by Petitioners appear to be for legitimate law enforcement goals, many clearly are not. For example, the FBI claims it must be able to send such information to our embassies so they can "assure" foreign governments about the integrity of American citizens (Cert. Pet. 16-17). Petitioners never explained why the information sent to such embassies could not be summaries, with certain details expurgated.

Petitioners have also argued that the FBI must be able to disclose such highly confidential information for various management or administrative purposes such as audits and budget considerations. Petitioners' purposes could be adequately satisfied, and individual's privacy protected, with summaries either omitting any personal identifiers, or only categorizing the specific information. In any event, those practices and the applicability of Exemption 7, or any of the other provisions of the FOIA to such documents, are not before the Court at this time.

Petitioners' main argument is that the Court of Appeals' decision was based on the faulty assumption that the word "records" was added to distinguish documents from the "information" they contain (Pet. Br. p. 18). This contention is totally unfounded.

Nowhere in the Court of Appeals' decision is reference made to the distinction between "files" and "records." Petitioners' sole argument in support of their claim is their own assertion that the Court of Appeals could not have reached its decision by focusing on the reason the documents were compiled in the first place because of the court's treatment of the attachments (Pet. Br. at. 20-21).[11]

Although the use of the term "records" instead of "information" in the amendments clearly supports the Court of Appeals' decision, the plain meaning of the statute made it unnecessary for the court to rely on any legislative history (Pet. App. 15a).

Petitioners are attempting to have the courts exchange the Congressionally selected term "records" in Exemption 7 for "information," and to create a new privacy exemption. Although there can be no question that Congress was concerned about the disclosure of information when it amended the FOIA in 1974, the language of Exemption 7 refers to "records" and not to "information".[12] The legislative history used by Petitioners to argue that Congress used "record" synonymously with "information"

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[11]Even Petitioners have previously acknowledged the Court of Appeals' basis for its position with respect to the attachments was its interpretation of *Sears* (Cert. Pet. 17, n.6). However, see infra note 13.

[12]Petitioners make much of the seeming interchangeable use of the words "files," "records" and "information" during Senate floor debates (Pet. Br. at 17-19). Suffice it to say that this alleged ambiguity strengthens the case for sticking to the plain meaning of the statute, *i.e.*, "records".

does not withstand serious analysis (Pet. Br. 18-19). When records are released, information is, by definition, released. Therefore, the quotes relied on by Petitioners are not using the terms synonymously, but rather refer to what will occur when the records are released. For example, Petitioners first cite Senator Hart's statement that the courts' interpretation of the pre-amendment Exemption 7 would "deny public access to *information*. . ." 1975 Source Book 333 (Pet. Br. 18 [emphasis added by Petitioners]). This citation, while again demonstrating Congress' concern about the lack of dissemination of information, does not support Petitioners' contentions. Nor does Petitioners' next citation of Senator Kennedy's remarks explaining why his bill had not included Senator Hart's floor amendment (Pet. Br. 18-19). He had "believe[d] that the public was secure in its right to obtain *information* falling within the 'investigatory file' exception to disclosure mandated by the act." (1975 Source Book 335 [emphasis added by Petitioners]). Again this demonstrates Congress' concern about dissemination of information. In both of these quotations, the Senators are referring to the pre-amended Exemption. And their understanding was that when "files," like "records," are released, information, by definition, would be released.

In summary, the Court of Appeals decision in this case was based on the clear statutory language of and intent behind Exemption 7(C), which indicates that the threshold test applies to the document and not to the information contained in such documents. In addition, its decision to release this FBI document is clearly supported by the legislative history.

One final point should be made. The Court of Appeals remanded the case in part to allow the District Court to examine the contents of the "attachments" to the "name

check summaries," noting that the court was "unable to determine from the evidence in this case the precise nature of the 'attachments' or the purposes for which they were originally created" (Pet. App. at 22a). Petitioners have stated that "it is not entirely clear to what 'attachments' the court was referring," (Pet. Br. at 29), and, as noted in note 4 *supra*, Petitioners and Abramson apparently disagree on what the Court of Appeals meant by the "attachments" at issue.

Under Abramson's interpretation, deleted portions of the "attachments' are not barred from disclosure under Exemption 7(C) because (1) they fail to meet the threshold requirement of being "investigatory records compiled for law enforcement purposes" and (2) even if the underlying data upon which the "attachments" were based are exempt, that exemption does not pass through under this Court's analysis in *NLRB v. Sears, Roebuck & Co., supra.*[13] Abramson believes that he is entitled to have access to the deleted portions of the "attachments," for reasons set forth earlier in this brief (see 9 to 22). If, however, this Court does not wish to choose between conflicting interpretations concerning the precise nature of these attachments, Abramson respectfully suggests that the judgment of the Court of Appeals be affirmed and that the portion of the case dealing with the attachments be remanded to the District Court to determine the nature of the attachments and whether they, or portions thereof, can be withheld under Exemption 7.

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[13]Abramson believes that the Court of Appeals interpreted *Sears* too broadly. In *Sears*, the court was concerned with whether documents which were originally exempt would lose their exemption because they were incorporated by reference into a non-exempt document, not as in the case before the bar, whether copies of the original document lose their exemptions if they are attached to a non-exempt document.

CONCLUSION

The judgment of Court of Appeals should be affirmed.

Respectfully submitted.

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